RECENT CASES

Constitutional Law—Constitutionality of Second Municipal Bankruptcy Act—Appellant, an insolvent California irrigation district, presented a petition for confirmation of a composition under the Second Federal Municipal Bankruptcy Act.[1] A California statute[2] authorized any taxing district to file such petitions under the "Federal Bankruptcy Statute". The district court, in ruling on a motion filed by dissenting bondholders, decided[3] that the Act was an unconstitutional invasion of state sovereignty. On appeal to the Supreme Court,[4] *held* (two justices dissenting), that the Act is constitutional since the State of California had agreed to permit its instrumentalities to submit to it. *United States v. Bekins,* 304 U. S. 27 (1938).

The Sumners Act[5] was held unconstitutional in *Ashton v. Cameron County Water Improvement District No. I,*[6] discussed in a previous issue of this REVIEW,[7] on the ground that by including political subdivisions of the states within its terms it encroached on the limits of state sovereignty. The new Act was passed with the idea of circumventing this decision.[8] However, the district court ruled that since its provisions were so similar to those of the Sumners Act it was within the terms of the *Ashton* decision. The instant case admitted that this Act, like the Sumners Act, is an invasion of state sovereignty, but held that it is a permissible one since the state had already given its consent. But it qualifies this rule[9] by providing that in so consenting the state can act only in aid and not in derogation of its sovereign powers.[10] Undoubtedly, the Court reached a salutary result; for if it had decided otherwise, both sovereigns would have been helpless, since any state law which cancelled pre-existing indebtedness would violate Article I § 10 of the Constitution.[11] However, by giving its consent the state necessarily relinquishes a portion of its sovereignty; therefore, it would seem that the limitation defeats the rule. Moreover, it is difficult to reconcile this decision with the holding of the *Ashton* case where the state had also given its consent but the Court said that "neither consent nor submission by the States can enlarge the power of Congress".[12]

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1. 50 STAT. 653 (1937), 11 U. S. C. A. §§ 401-404. This was re-enacted as Chapter IX of the Chandler Act. Pub. L. No. 696, 75th Cong., 3d Sess. (June 22, 1938) §§ 81-84.
2. Cal. Laws, Ex. Sess. 1934, c. 4.
3. *In re* Lindsay-Strathmore Irrigation District, 21 F. Supp. 129 (S. D. Cal. 1937), 86 U. OF PA. L. REV. 310 (1938).
4. Since the constitutionality of an Act of Congress was involved, the case was appealed directly to the Supreme Court from the District Court under the Act of Aug. 24, 1937. 50 STAT. 751 (1937), 28 U. S. C. A. § 401.
5. 48 STAT. 798 (1934), 11 U. S. C. A. §§ 301-303 (Supp. 1937). This was the First Municipal Bankruptcy Act.
6. 298 U. S. 513 (1936).
7. 85 U. OF PA. L. REV. 111 (1936).
8. SEN. REP. No. 911, 75th Cong., 1st Sess. (1937) 2; see also 86 U. OF PA. L. REV. 310 (1938).
9. A similar principle was adhered to in Steward Machine Co. v. Davis, 301 U. S. 548 (1937): ". . . Even sovereigns may contract without derogating from their sovereignty. . . . The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. . . . We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment." *Id.* at 597.
10. Instant case at 54.
11. Sturges v. Crowninshield, 4 Wheat. 122 (U. S. 1819).
12. 298 U. S. 513, 531 (1936).

Constitutional Law—Housing as a Public Use Within Constitutional Limitations on the State's Power of Eminent Domain—A taxpayer filed a bill in equity to test the constitutionality of housing statutes [1] providing for the creation of state housing authorities to act in conjunction with the Federal Housing Authority in constructing and operating low-cost housing projects. The plaintiff urged chiefly [2] that use of the housing would not be public and therefore that the land on which the dwellings were to be built could not be acquired by eminent domain under the Fourteenth Amendment and the state constitution. *Held* (Justices Schaffer and Drew dissenting), that the statutes were constitutional because the housing would benefit the public and therefore condemnation would be for a public use. *Dornan v. Philadelphia Housing Authority,* 200 Atl. 834 (Pa. 1938).

It is constitutional dogma that state governments can exercise eminent domain, under their general police power, for projects involving a public use.[3] Courts, however, have variously defined "public use", some saying that a project contributing to the general welfare involves a public use,[4] and others saying that a use is not public unless it involves a general right of user by the public.[5] Under the former definition the constitutionality of housing programs can easily be rationalized since slum clearance involves a destruction of focal centers of disease, fires and accidents, and pernicious moral influences.[6] Under the latter definition such programs must fall since use of the housing is limited to a part only of the public. Statutes similar to those in the instant case have been passed in thirty-one states.[7] Besides Pennsylvania, the courts of six states have ruled on the question of their constitutionality and like Pennsylvania all have accepted the broader definition of public use and have sustained them.[8] But this is in sharp contrast to federal court decisions on federal housing statutes,[9] and to one earlier state court decision.[10] Moreover, the Pennsylvania cases have given expression to both tests for determining a public use.[11] It is

1. Housing Cooperation Law, PA. STAT. ANN. (Purdon, Supp. 1937) tit. 35, § 1581 *et seq.;* Housing Authorities Law, PA. STAT. ANN. (Purdon, Supp. 1937) tit. 35, § 1541 *et seq.*

2. It was also urged that the statutes entailed unconstitutional legislation for a special class, delegation of authority, and excess of debt limitations. The court overruled all of these contentions.

3. Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527 (1906). See (1936) 84 U. OF PA. L. REV. 902, 903.

4. State *ex rel.* Twin City Building & Investment Co. v. Houghton, 144 Minn. 13, 176 N. W. 159 (1920). See 1 NICHOLS, EMINENT DOMAIN (2d ed. 1917) 131.

5. Smith v. Cameron, 106 Ore. 1, 210 Pac. 716 (1922). See 1 NICHOLS, EMINENT DOMAIN (2d ed. 1917) 129.

6. See instant case at p. 841.

7. See instant case at p. 836.

8. Opinion of the Justices, 5 U. S. L. WEEK 946 (Ala. 1938); Marvin v. Housing Authority of Jacksonville, 183 So. 145 (Fla. 1938); Spahn v. Stewart, 268 Ky. 97, 103 S. W. (2d) 651 (1937); State *ex rel.* Porterie v. Housing Authority of New Orleans, 182 So. 725 (La. 1938); Wells v. Housing Authority of Wilmington, 197 S. E. 693 (N. C. 1938); New York City Housing Authority v. Muller, 270 N. Y. 333, 1 N. E. (2d) 153 (1936).

9. United States v. Certain Lands in the City of Louisville, 78 F. (2d) 684 (C. C. A. 6th, 1935). A state statute attempting to authorize slum clearance by the Federal Government was held invalid in United States v. Certain Lands in the City of Detroit, 12 F. Supp. 345 (E. D. Mich. 1935). It should be noted that apart from the court's theory as to public use, there was in these cases an objection based on the Federal Government's complete lack of power to undertake housing projects. See (1935) 48 HARV. L. REV. 1021.

10. Opinion of Justices, 211 Mass. 624, 98 N. E. 611 (1912).

11. See Twelfth Street Market Co. v. Pennsylvania & Reading Terminal R. R., 142 Pa. 580, 587, 21 Atl. 989, 990 (1891): "To constitute a public use, . . . the public must have a right of use"; Jacobs v. Clearview Water Supply Co., 220 Pa. 388, 393,

significant, therefore, that the Pennsylvania Supreme Court in this case has adopted the broader statement of the principle, embodied in the "public welfare" test; for only this view takes into account the high degree of interdependency of individuals in a mature industrial society.

Conflict of Laws—Constitutionality of Statute Providing for Constructive Personal Service on Non-Resident Owner of Real Estate—Plaintiff brought suit in Pennsylvania against defendant,[1] a resident of New Jersey, for damages arising from a fall on a broken sidewalk abutting property in Pennsylvania upon which defendant held a mortgage. A Pennsylvania statute [2] provides for a substituted service [3] which results in personal jurisdiction over a non-resident owner, tenant, or user of real estate,[4] in accident cases arising out of the use of such real estate. Defendant received service in the manner prescribed by the statute. *Held,* that the statute is not a deprivation of property without due process and the service is valid. *Dubin v. City and Lesher,* Phila. Legal Intelligencer, Sept. 19, 1938, p. 1, col. 2 (Pa. C. P. 1938).

In upholding the constitutionality of this statute in derogation of the common law, the court has greatly widened the state's jurisdiction *in personam.* At common law, neither the ownership of property [5] nor the occurrence of operative facts within a state [6] will give the state jurisdiction to render a personal judgment against the owner or actor. However, modern statutes have been upheld which have designated certain acts, the performance of which within the state will subject the non-resident actor to the personal jurisdiction of that state in all cases growing out of the acts involved. Thus the entering of a special appearance for the purpose of contesting the jurisdiction of the court,[7] the appointment of an agent to sell securities,[8] or, in the case of corporations, the mere doing of business,[9] have been upheld by the courts as acts which the legislature can designate as giving the state personal jurisdiction over the actor in all litigation growing out of these acts. Particularly important among these statutes are those

69 Atl. 870, 872 (1908): "If the proposed improvement tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the commonwealth, the use is public."

1. Actually, but unimportant to the issue involved, the plaintiff sued the city. The city then joined Lesher, additional defendant, by sci. fa. proceedings.

2. PA. STAT. ANN. (Purdon, Supp. 1937) tit. 12, § 331.

3. The statute provides that the summons should be sent by registered mail, fifteen days before the return day, both to the defendant and the Secretary of the Commonwealth. The return receipts must be attached to and made part of the return of service. The statute would be unconstitutional unless reasonable notice was provided for the defendant. Wuchter v. Pizzutti, 276 U. S. 13 (1928). However, the defendant's refusal of the registered letter will not make the service bad. Wax v. Van Marter, 124 Pa. Super. 573, 189 Atl. 537 (1937), 85 U. OF PA. L. REV. 739.

4. Defendant was a mortgagee in possession. In addition to claiming the act was unconstitutional, she maintained that she was not within the meaning of it. The court refused to rule on this because of poor pleadings. Leave was granted to amend the petition so as to get this clearly before the court. An amended petition to strike off the service of the sci. fa. was filed on Sept. 27, 1938.

5. Pennoyer v. Neff, 95 U. S. 714 (1877); Walkock v. Adkins, 60 Okla. 38, 158 Pac. 587 (1916); 1 BEALE, CONFLICT OF LAWS (1935) § 74.5; GOODRICH, CONFLICT OF LAWS (1927) § 72.

6. Singh v. Rajah of Faridkot, [1894] A. C. 670; see BEALE, CONFLICT OF LAWS (1935) § 84.1; GOODRICH, CONFLICT OF LAWS (1927) § 76.

7. York v. Texas, 137 U. S. 15 (1890); Western Indemnity Co. v. Rupp, 235 U. S. 261 (1914).

8. Doherty v. Goodman, 294 U. S. 623 (1935), 83 U. OF PA. L. REV. 921, 48 HARV. L. REV. 1433.

9. St. Clair v. Cox, 106 U. S. 350 (1882); Rosenburg v. Curtis Brown Co., 260 U. S. 516 (1923).

dealing with non-resident motorists.[10] Although there is some language in the cases referring to the non-resident's having consented to the jurisdiction, the constitutionality of such statutes is generally said to rest on the police power of the state exercised to promote the public safety.[11] It would seem to follow that only such acts as could be regulated under the police power could be designated as giving the state personal jurisdiction.[12] The present statute might have been sustained on these grounds, but the instant court reached its result by reasoning that it is just as important that a non-resident owner of real estate keep it in reasonable repair as it is that he drive his automobile with due regard for the safety of others. But certainly there is inherent in the driving of an automobile more danger to the public than there is in the mere ownership of property. Indeed it is important that non-resident actors at all times conduct themselves with due regard to the safety of others. It is possible, therefore, that the instant case evidences a tendency on the part of the courts toward allowing the state in which a tort is committed personal jurisdiction over the tort feasors.[13]

Contempt of Court—Publication Concerning Pending Cause— Defendants were cited for contempt of court, after publishing newspaper editorials praising conviction of a politician for soliciting bribes and of sit-down strikers, before sentence was passed. The editorials also opposed probation of union workers who had been convicted of assaulting non-union men. *Held,* that the defendants were guilty, because the right to a fair trial is as sacred as the freedom of the press, and a trial is still pending if there are "any further judicial acts" to be performed: *In re Times-Mirror Company, et al.,* 5 U. S. L. WEEK 1530 (Cal. 1938).

During the past few decades the doctrine of summary punishment for contempt by publication has been widely criticized.[1] Probably the most frequent point of attack is the alleged infringement of constitutional guaranties of freedom of the press,[2] the defense set up in the instant case. Although this argument was frequently sanctioned in the early decisions,[3]

10. Hess v. Pawloski, 274 U. S. 352 (1927), 76 U. OF PA. L. REV. 93, 41 HARV. L. REV. 94, 26 MICH. L. REV. 212. At least thirty-five states have such statutes. See Culp, *Process in Actions Against Non-Resident Motorists* (1934) 32 MICH. L. REV. 325 (footnote 2 of this article collects the principle articles written in this field).

11. See Culp, *supra* note 10, at 327.

12. See RESTATEMENT, CONFLICT OF LAWS (1934) § 85, comment *d.*

13. Such a rule was suggested in 1929. See Dodd, *Jurisdiction in Personal Actions* (1929) 23 ILL. L. REV. 427.

1. Beale, *Criminal and Civil Contempt of Court* (1908) 21 HARV. L. REV. 161; Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempt in "Inferior" Federal Courts* (1924) 37 HARV. L. REV. 1010; Gregory, *The Courts and Free Speech* (1913) 8 ILL. L. REV. 141; Laski, *Procedure for Constructive Contempt in England* (1928) 41 HARV. L. REV. 1031; Yankwich, *Use and Abuse of Contempt Commitments* (1931) 65 U. S. L. REV. 481; and references cited *infra* note 18. But see Goodhart, *Newspapers and Contempt of Court in English Law* (1935) 48 HARV. L. REV. 885; Notes and Comment (1931) 65 U. S. L. REV. 475; (1930) 28 MICH. L. REV. 616. For an exhaustive discussion, see C. H. THOMAS, PROBLEMS OF CONTEMPT OF COURT (1934).

2. See, however, Nelles and King, *Contempt by Publication in the United States* (1927) 28 COL. L. REV. 401, 525, suggesting that the guaranty of trial by jury is the constitutional safeguard primarily involved, and also suggesting that the due process clause is being violated: "If the sweep of the Fourteenth Amendment is to be broad, logic requires that it be broad consistently" (*id.* at 403, n. 13).

3. Stuart v. People, 3 Scam. 395 (Ill. 1842); Storey v. People, 79 Ill. 45 (1875); *Ex parte* Hickey, 12 Miss. 751 (1845).

the modern trend is overwhelmingly in the opposite direction.[4] Even statutes limiting the power to punish summarily for contempt to acts committed in the immediate presence of the court, or so near as actually to obstruct the court's work, have been generally declared unconstitutional or construed away.[5] Among the types of publication held to be punishable are those which attempt to intimidate judges,[6] are calculated to prejudice fair and impartial action in a cause then pending,[7] would "embarrass the court" in the administration of justice,[8] or which scandalize the courts,[9] quite apart from the possibility of influencing any decision.[10] Actually, in the last analysis most of the decisions are simply concerned with uncomplimentary remarks about judges. Thus it may readily be seen that the very nature and scope of the power lend themselves to tremendous possibilities of abuse.[11] In justification the courts have long asserted immemorial usage and necessity to preserve judicial functioning.[12] But Sir John Fox, eleven years ago, has conclusively demonstrated the misapprehension on which was based the theory of common law precedent as the origin of the power.[13] As for the argument of necessity, the federal courts from 1831 to 1917, and the Pennsylvania courts to this day, have given effect to statutes abolishing summary punishment for contempt by publication;[14] yet in neither jurisdiction has respect for judicial authority been substantially impaired. This would seem to indicate the "necessity" is more imaginary than real. In the instant case, however, it was not a question merely of offending the dignity of the court but of prejudicing the cause of the various defendants. Once granted the correctness of the

4. Patterson v. Colorado, 205 U. S. 454 (1907); People v. Wilson, 64 Ill. 195 (1872); 2 BISHOP, CRIMINAL LAW (9th ed. 1923) 205.

5. 36 STAT. 1163 (1911), 28 U. S. C. A. § 385 (1928), Toledo Newspaper Co. v. United States, 247 U. S. 402 (1917), supplanting State v. Morrill, 16 Ark. 384 (1855) as the leading case on the interpretation of such statutes. For full discussion see C. H. THOMAS, *op. cit. supra* note 1, app. B; and Nelles and King, *supra* note 2, at 554-562. See also J. L. THOMAS, LAW OF CONSTRUCTIVE CONTEMPT (1904) 82-83. One of the few leading exceptions is Pennsylvania. PA. STAT. ANN. (Purdon, 1931) tit. 17, §§ 2042, 2044; (1931) 79 U. OF PA. L. REV. 497; *cf.* Judge Patterson's view, Patterson, *Contempt* (1932) 11 PENN. B. A. Q. 18. For a highly interesting situation which has recently arisen in Pennsylvania, see the Philadelphia Evening Bulletin, October 6, 1938, p. 3, col. 3.

6. McDougall v. Sheridan, 23 Ida. 191, 128 Pac. 954 (1913).

7. Globe Newspaper Co. v. Commonwealth, 188 Mass. 449, 74 N. E. 682 (1905).

8. Patterson v. Colorado, 205 U. S. 454, 459 (1907).

9. *Ex parte* Barry, 85 Cal. 603, 25 Pac. 256 (1890); People v. Wilson, 64 Ill. 195 (1872).

10. State v. Hildreth, 82 Vt. 382, 74 Atl. 71 (1909), one of the cases where the cause to which the publication referred was no longer pending.

11. Among the least justifiable of the decisions is State v. Shumaker, 200 Ind. 623, 157 N. E. 769 (1927), 76 U. OF PA. L. REV. 210, *rehearing denied*, 200 Ind. 716, 162 N. E. 441 (1929), where a member of the clergy was adjudged guilty of contempt for criticizing the decisions of certain liquor cases. The majority, in a three-two decision, treated the case as if the defendant had charged the court with being dominated by the liquor interests; the two dissenting judges pointed out that the defendant had only said that the interests were seeking to control the courts, and added that under the doctrine as laid down by the majority, Abraham Lincoln should have been convicted for contempt for his criticism of the *Dred Scott* decision: *id.* at 661, 157 N. E. at 781. This case was characterized as "highly arbitrary, if not illegal" by a writer whose general conclusions have been, for the most part, set forth with great reserve and objectivity: C. H. THOMAS, *op. cit. supra* note 1.

12. The leading case, of course, is Respublica v. Oswald, 1 Dall. 319 (Pa. 1788).

13. FOX, HISTORY OF CONTEMPT OF COURT (1927). It is interesting to note that although Fox's conclusions have thus far gone unchalleneged, the courts continue to cite the common law as their justification. See, for instance, Sauer v. Andrews, 115 Cal. App. 272, 274, 1 P. (2d) 997, 998 (1931), quoting Briggs v. Superior Court, 211 Cal. 619, 297 Pac. 3 (1931).

14. See *supra* note 5.

doctrine, therefore, its exercise here seems somewhat justified as a sincere attempt to protect the right of the accused to a fair trial.[15] But it must be admitted that similar occurrences are by no means rare; Clarence Darrow is said to have remarked that "As the law stands today, there is no important criminal case where the newspapers are not guilty of contempt of court day after day."[16] Such use of the power to punish summarily, however, as exercised in this case, is the exception rather than the rule, and the possibilities of abuse in protecting judicial sensitivity from adverse criticism of any sort are tremendously dangerous.[17] Certainly the entire doctrine should be thoroughly reexamined; and in any event, the less hazardous course would seem to be a stricter adherence to legislative restrictions,[18] particularly at present when democratic safeguards and liberties must be jealously preserved.

Criminal Law—Evidence—Unconstitutionality of a Statute Permitting Comment by the Judge on the Failure of the Accused to Testify—An advisory opinion was requested by the state senate on the constitutionality of a proposed bill [1] which would prohibit comment by counsel, but permit the judge, if satisfied at the close of the evidence that a defendant could contradict material testimony of the prosecution, to instruct the jury that the defendant's silence could be considered in their deliberations. *Held,* that the bill would be unconstitutional [2] since it would com-

15. The English decisions tend to deal more with this type of offense, rather than concentrate on the protection of judicial dignity. (1932) 81 U. OF PA. L. REV. 214. But the English law is substantially the same. DAWSON, LAW OF THE PRESS (1927) 94-111; FISHER AND STRAHAN, LAW OF THE PRESS (2d ed. 1898) 257-266; OSWALD, CONTEMPT OF COURT (3d ed. 1910) 6. A possible explanation, however, which is usually overlooked, of the difference in emphasis noticeable in the English cases is that perhaps the newspapers have been more reticent in their comments concerning the judiciary.

16. Quoted in Perry, *Trial by Newspaper* (1932) 66 U. S. L. REV. 374, 379. Perry believes the source of the trouble is the invasion of politics into the administration of justice, and his proposed solution is a system of appointed judges for life tenure.

17. Judges have frequently been quick to note the possibility that they *might* be influenced by adverse publications, and therefore it naturally follows that such publications tend to "obstruct the administration of justice". See, for example, People v. Wilson, 64 Ill. 195, 214 (1872). Yet it appears impossible to find a single case where the judge admitted that he actually *was* so influenced; following the lead of Chief Justice McKean in Respublica v. Oswald, 1 Dall. 319 (Pa. 1788), they have seldom recognized the immediate likelihood that they were prejudiced, even in passing judgment on the very persons who had attacked them. Human nature being what it is, judges are more frequently influenced by favorable comment; yet, as Nelles and King point out, *supra* note 2, at 547, n. 92, such comment seldom calls forth any rebuke. Many of the cases are covered by the objection raised by Mr. Justice Holmes in his dissent in Toledo Newspaper Co. v. U. S., 247 U. S. 402, 424 (1917): "But a judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty."

18. The strongest argument to this effect has been made by Nelles and King, *supra* note 2. See also Chused, *Public Comment as Contempt of Court* (1930) 16 ST. LOUIS L. REV. 24, and Note (1930) 18 CALIF. L. REV. 166. For a well-reasoned and enlightened judicial discussion, see State v. American-News Co., 64 S. D. 385, 266 N. W. 827 (1936).

1. The bill was to amend the present statute which provided that the defendant, at his request, shall be a competent witness, but that "his neglect or refusal to testify shall not create any presumption against him". MASS. GEN. LAWS (1932), c. 233, § 20, cl. 3.

2. An excellent discussion of both sides of the issue can be found in two articles, the latter being written in answer to the first. Reeder, *Comment Upon Failure of Accused to Testify* (1932) 31 MICH. L. REV. 40; Bruce, *The Right to Comment on the Failure of the Defendant to Testify* (1932) 31 MICH. L. REV. 226.

pel the defendant to incriminate himself.[3] *In re Opinion of the Justices,* 15 N. E. (2d) 662 (Mass. 1938).

After the decision by the South Dakota court [4] invalidating a statute permitting the district attorney to comment on the defendant's silence, this decision by the conservative Massachusetts court is not unexpected. It is to be regretted because, by adopting the same broad view of the constitution as the former court, it has blocked needed reform in the law of criminal evidence.[5] There is little justification, historically [6] or logically, for this broad interpretation, as the privilege against self-incrimination was designed only to prevent compelling the defendant by direct force to furnish the evidence against himself. Enactments in most states [7] forbidding an inference from his silence offer convincing proof that the very legislators who made the defendant a competent witness felt that the constitutions did not preclude drawing the inference. Furthermore, there is good authority in other aspects of the law of evidence to restrict the privilege to actual testimony and to permit real evidence of the defendant's person and actions. Thus, an inference of guilt can be drawn from the defendant's failure to deny accusation of a crime made in his presence,[8] from his failure to account for his possession of stolen goods,[9] and from his flight;[10] and the courts have sanctioned compulsory exhibition of the person, compulsory finger printing, and wearing of particular clothing.[11] Observing this tendency to limit the privilege, the legislature drafted a bill permitting judicial comment, but under restrictions requiring the prosecution to establish its case substantially before the inference would arise. This negatived the greatest objection to the reform—that district attorneys would use the

3. MASS. CONST., Part I, art. XII provides: "No subject shall be . . . compelled to accuse or furnish evidence against himself." RESTATEMENT, ADMINISTRATION OF CRIMINAL LAW (Tent. Draft No. 1, 1931) at page 35, has a complete list of all constitutional provisions in the various states. One correction must be made on that compilation, for California by constitutional amendment now permits comment by the judge. STAT. AND AMEND. TO CAL. CODES (1935) p. 1941.

4. State v. Wolfe, 64 S. D. 178, 266 N. W. 116 (1936), 27 J. CRIM. L. 279; Note (1937) 22 CORN. L. Q. 392.

5. Both the American Law Institute and the American Bar Association have advocated far more radical reform than that involved in the instant case, for both would allow comment by the district attorney as well as the court. See 9 PROC. AM. L. INST. (1931) 202-218; (1934) 20 A. B. A. J. 651. See also, KNOX, *Self-Incrimination* (1925) 74 U. OF PA. L. REV. 139, 148-154; Terry, *Constitutional Provisions Against Forcing Self-Incrimination* (1906) 15 YALE L. J. 127.

6. For the history of the privilege see: 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2250; Boiarsky, *Right of the Accused in a Criminal Case Not to Be Compelled to Be a Witness Against Himself* (1925) 35 W. VA. L. Q. 27.

7. There are forty-one states which have statutory prohibition in one form or another of the drawing of an inference against the defendant from his neglect or refusal to testify. For a complete list of the statutes see Reeder, *supra* note 2, at 43, ns. 23-25. Mr. Reeder's list must be amended as certain changes have been made since his article was published. South Dakota must be added following the *Wolfe* case which invalidated her statute allowing comment, and California and Vermont must be removed from the list since California by constitutional amendment, and Vermont by statute now permit comment by the judge. STAT. AND AMEND. TO CAL. CODES (1935) p. 1941; VT. LAWS (1935), p. 69. Note also that in Connecticut, although there is a statutory prohibition of comment by the district attorney, by judicial decision the judge has been authorized to comment on the silence of the accused. State v. Ford, 109 Conn. 490, 146 Atl. 828 (1929).

8. 2 WHARTON, CRIMINAL EVIDENCE (11th ed. 1935) 1089, 1098. Note (1938) 115 A. L. R. 1510.

9. 5 WIGMORE, EVIDENCE 509.

10. 1 WHARTON, CRIMINAL EVIDENCE (11th ed. 1935) 140, 404.

11. *Id.* at 606. Note also the further limitation that the possibility of prosecution in another jurisdiction will not enable a witness to invoke the privilege. *Id.* at 609.

inference, rather than their own evidence, for conviction.[12] In spite of the arguments of history, practice, and policy favoring constitutionality, the court found it necessary to follow the broad interpretation of the constitutional provision and invalidate the proposed legislation. It is to be hoped that in the future this view of the constitutional privilege will be rejected and that similar legislation in other states, limiting the protection to the guilty offered by the privilege, will be regarded as constitutionally sound.[13]

Divorce—Construction of Statute Making Separation for a Period of Years a Ground for Absolute Divorce—Plaintiff deserted his wife, and, after a period of three years, sued for a divorce under a statute directing that "When husband and wife have lived apart for three consecutive years, without cohabitation, the court shall grant an absolute decree of divorce at the suit of either party." [1] From a decree granting an absolute divorce, defendant appealed. *Held* (three justices dissenting), that the decree should be reversed with directions to dismiss the complaint, because the statute contemplates a separation by mutual agreement, not abandonment of one spouse by the other. *White v. White,* 116 S. W. (2d) 616 (Ark. 1938).

Statutes similar to the one involved in the instant case are becoming increasingly common.[2] They are based on the theory that, where a couple have lived apart for a long period of time,[3] the possibility of reconciliation is negligible, and the best interests of society and of the parties themselves will be promoted by an absolute divorce.[4] When it is evident that nothing remains of the original marital bond but the legal relationship, the state should give up its objections to severance of the union and not force continuance of a situation fraught with possibilities of harm to the individuals involved, in the form of physical and mental frustration and their consequences, and to society as a result of crime and economic losses.[5] The instant case seems to come within this policy, and probably, as the dissent stated, the legislature intended the statute to cover such a situation. At least there is nothing in its terms to exclude such an interpretation and, under similar statutes, other jurisdictions have so ruled.[6] Furthermore, granting a divorce in this case would not necessarily injure the wife

12. Dunmore, *Comment on Failure of Accused to Testify* (1917) 26 YALE L. J. 464, 469.

13. Particularly significant in this respect is that Vermont now has a statute similar to the one in question in the Massachusets case, and the Vermont statute has not as yet been challenged. VT. LAWS (1935), p. 69.

1. ARK. DIG. STAT. (Pope, 1937) § 4381-7.

2. ARIZ. REV. CODE ANN. (Courtright, 1936) § 2179-9; 49 STAT. 539 (D. C. 1935); KY. STAT. ANN. (Carrol, 1936) § 2117-2; LA. GEN. STAT. ANN. (Dart, 1932) § 2202; Md. Laws 1937, c. 396; NEV. STAT. 1931, c. 291, § 3; TEX. STAT. ANN. (Vernon, 1928) § 4629-1; WASH. REV. STAT. ANN. (Remington, 1932) § 982-8; WIS. STAT. (1931) § 247.07.

3. The period of separation varies from ten years in Rhode Island to two years in North Carolina.

4. See BALLARD, SOCIAL INSTITUTIONS (1936) 102; Groves, *Hazards of Modern Marriage* (1937) 5 DUKE B. J. 66, 73; Lichtenberger, *Divorce Legislation* (1932) 160 THE ANNALS 116, 120; Note (1927) 51 A. L. R. 763.

5. Smith v. Smith, 54 R. I. 236, 172 Atl. 323 (1934); see BALLARD, *op. cit. supra* note 4, at 100; GOODSALL, PROBLEMS OF THE FAMILY (Rev. ed. 1936) 410-13; (1938) 2 MD. L. REV. 357.

6. Ward v. Ward, 213 Ky. 606, 281 S. W. 801 (1926); Best v. Best, 218 Ky. 648, 291 S. W. 1032 (1927); Goudeau v. Goudeau, 146 La. 742, 84 So. 39 (1920). Accord: Schuster v. Schuster, 42 Ariz. 190, 23 P. (2d) 559 (1933). *Cf.* Herrick v. Herrick, 53 Nev. 59, 25 P. (2d) 378 (1933); Smith v. Smith, 54 R. I. 236, 172 Atl. 323 (1934). *Contra:* Parker v. Parker, 210 N. C. 264, 186 S. E. 346 (1936); Hyder v. Hyder, 210 N. C. 486, 187 S. E. 798 (1936).

economically, since, where the suit is based on separation, alimony is generally awarded the wife, even though the husband is plaintiff, if she would have been entitled to it had she been plaintiff.[7] On the other hand, it has been argued that the purposes underlying this type of statute are, first, to legalize the very prevalent collusive divorce,[8] and, secondly, to permit parties who have been separated by agreement, to be divorced without the notoriety which usually accompanies a suit based on the customary grounds, even though such grounds exist.[9] Under this view, the decision of the court can be justified, because both situations presuppose a mutual desire for divorce. However, generally, where the legislative intent has been thus interpreted, the statute involved has either expressly provided that the separation be voluntary,[10] or has limited the right to sue to the injured party.[11] In the instant case, it would seem that the court was unwilling to allow the plaintiff to profit by his own misconduct, and therefore read the requirement of "separation by agreement" into the statute.[12]

Labor Law—Permissibility under New York Labor Relations Act of Negotiations with Individual Employees after Appointment of Exclusive Bargaining Agent—Petitioner appealed from New York State Labor Relations Board order to bargain with Industrial Insurance Agents Local 30,[1] which Board had certified as exclusive collective bargaining representative of insurance agents in designated units. *Held,* that petitioner should bargain with union, but that the union's exclusive collective bargaining power should not "prevent negotiation between the petitioner and any of its employees, each acting for himself." *Metropolitan Life Insurance Co. v. New York State Labor Relations Board,* N. Y. L. J., July 27, 1938, p. 235, col. 4 (N. Y. Sup. Ct. 1938).

Although the New York Act provides for exclusive collective bargaining with the certified union, there is the further provision "that employees, directly or through representatives, shall have the right at any time to present grievances to their employer." [2] There are similar sections in the six important labor relations acts,[3] and the instant court is not alone in

7. See cases collected in Note (1937) 111 A. L. R. 867. See also LA. CIV. CODE ANN. (Dart, 1932) § 160.

8. Note (1936) 36 COL. L. REV. 1121, 1131-33.

9. Feinsinger, *Observations on Judicial Administration of Divorce Law in Wisconsin* (1932) 8 WIS. L. REV. 27, 39, 40. For another suggested reason for the enactment of this type of statute, see Zacharias, *Suggested Divorce Reforms for Illinois* (1937) 15 CHI-KENT REV. 114.

10. Md. Laws 1937, c. 396; Campbell v. Campbell, 198 Atl. 414 (Md. 1938). See Note (1927) 51 A. L. R. 763, for cases interpreting the Wisconsin Statute.

11. WASH. REV. STAT. ANN. (Remington, 1932) § 982-8; Pierce v. Pierce, 120 Wash. 411, 208 P. 49 (1922).

12. It is interesting to compare the court's decision as to the legislative intent in the statute involved in the principal case, with the decision of the North Carolina Court in Parker v. Parker, 210 N. C. 264, 186 S. E. 346 (1936), in which the court held that, under a statute making separation, etc., "under a deed of separation or otherwise" a ground for divorce (N. C. CODE (Michie, 1935) § 1659-a), a separation by mutual agreement was required, completely ignoring the "or otherwise". In 1937, the North Carolina legislature amended the statute by striking out "under a deed of separation or otherwise" (N. C. Pub. Laws 1937, c. 92), indicating that the court's interpretation of the original statute was erroneous.

1. *In re* Metropolitan Life Insurance Co. and Industrial Insurance Agents, Local 30, 2 L. R. REP. 655 (N. Y. L. R. B. 1938).

2. N. Y. CONSOL. LAWS (Cahill, Supp. 1937) c. 32, §§ 700, 705.1.

3. 49 STAT. 449, 453, 29 U. S. C. A. §§ 151, 159 (1935); Mass. Acts 1937, c. 436, § 9a; N. Y. CONSOL. LAWS (Cahill, Supp. 1937) c. 32, §§ 700, 705.1; PA. STAT. ANN. (Purdon, Supp. 1937) tit. 43, §§ 211, 211.7a; Utah Laws 1937, c. 55, § 10a; Wis. Laws 1937, c. 51, § 111.09.

attempting to give some effect to these provisions.[4] Certainly the labor acts are not entirely clear on the individual employee's capacity to negotiate, and it is understandable that the courts are hesitant to depart any more than necessary from the traditional concept of freedom of contract.[5] However, the labor relations boards have consistently resisted this interpretation,[6] on the theory that it permits circumvention of the collective bargaining clauses.[7] It must be admitted that if individual bargaining were conducted on a large scale, the whole purpose of the acts would be defeated. Strikes could be broken, organization frustrated, and the majority bargaining agent's demands ignored almost as effectively, although not so conveniently, as before the acts were passed.[8] The ultimate issue seems to be whether the traditional rights of the individual worker must be protected or whether, due to modern industrial conditions, such rights have become fictitious [9] and the freedom of Labor can be insured only by enforced submission of the individual to the organized group. Although clarification of the individual's status by the legislature is urgently needed, this type of labor legislation taken as a whole seems to be based on the latter philosophy. Hence it would be reasonable for the courts to give greater weight to the general purpose of these labor acts and to permit individual bargaining solely in respect to matters which are not properly the subject of collective bargaining.[10] Only in this way can the certified exclusive representative be truly exclusive in connection with matters in the collective sphere.

4. See Virginia Ry. v. System Federation No. 40, 300 U. S. 515, 548, 557, 559 (1937); National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U. S. 1, 44 (1937); National Labor Relations Board v. Sands Mfg. Co., 96 F. (2d) 721, 724 (C. C. A. 6th, 1938); Williams Mfg. Co. v. United Shoe Workers, 1 Prentice-Hall 1937 Labor & Unemployment Ins. Serv. ¶ 16,113 (Ohio C. P. 1937), where the court cites the dicta of the *Virginia Ry.* and *Jones and Laughlin* cases.

Unless effect is given to these provisions impasses may develop. *Cf.* Lund v. Woodenware Workers Union, 19 F. Supp. 607, 611 (D. Minn. 1937), where an employer was unable to negotiate with a minority union on strike. The usual outcome of such a situation is a closed shop for the majority union. See comment 1 L. R. Rep. 67 (1937).

5. In Adair v. United States, 208 U. S. 161 (1908), and Coppage v. Kansas, 236 U. S. 1 (1915), the Supreme Court held that legislation which attempted to limit the conditions under which an employer might hire or discharge his employees was unconstitutional, since it interfered with his right to freedom of contract, and consequently was a violation of the "due process" clause of the Fifth Amendment.

6. In the Matter of Atlas Mills, Inc. and Textile Workers' Union, 3 N. L. R. B. 10 (1937); *In re* Federal Carton Corp. and New York Printing Pressmen's Union No. 51, 2 L. R. Rep. 65 (N. L. R. B. 1938); *In re* Williams Mfg. Co. and United Shoe Workers, 2. L. R. Rep. 153 (N. L. R. B. 1938); *In re* National Licorice Co. and Bakery and Confectionery Workers, 2 L. R. Rep. 480 (N. L. R. B. 1938); The Collier Case, 1 L. R. Rep. 616 (N. Y. L. R. B. 1938); 1 Prentice-Hall 1937 Labor and Unemployment Ins. Serv. ¶ 15331.2.

7. See dissenting opinion of Biggs, *J.*, in National Labor Relations Board v. Delaware-New Jersey Ferry Co., 90 F. (2d) 520, 522 (C. C. A. 3d, 1937). Also, for interesting comment on this phase of the instant case, see Phila. Legal Intelligencer, Aug. 30, 1938, p. 4, col. 1.

8. ". . . five of the striking employees went back to work, the strike as an effective bargaining weapon was broken, and a prospect of securing agreement vanished." Atlas Mills, Inc. and Textile House Workers Union No. 2269, 3 N. L. R. B. 10, 20 (1938).

9. "A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer." American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 209 (1921).

10. This intent was shown by the House Committee on Labor, H. R. Rep. No. 1147, 74th Cong., 1st Sess. (1935) 19, commented on in 1 Prentice-Hall 1937 Labor and Unemployment Ins. Serv. ¶15353. Also see Note (1936) 4 U. of Chi. L. Rev. 169.

Taxation—Taxability of Profits Derived by Corporation From Sale of Its Own Stock—Taxpayer contracted to sell shares of its own stock to the A Corporation for $50 a share. The market price fell below $50 and the taxpayer continued to buy shares as they fell and sell them to the A Corporation. The B. T. A. held that the difference between the buying price and the selling price was taxable income.[1] Taxpayer appealed. *Held,* that the profits are taxable, but the tax must be computed on the difference between the value of the shares at the time of the sale and the sale price. *E. R. Sqibb & Sons v. Commissioner,* 98 F. (2d) 69 (C. C. A. 2d, 1938).

From 1918 until recently the courts and the B. T. A. have held in conformity with the Treasury Regulations [2] that a corporation realizes no gain or loss from purchases or sales of its own stock.[3] However due to a growing tendency to discourage stock speculations by corporations the rule was changed in several decisions to hold that the real nature of the transaction will be regarded where a corporation deals in its own stock.[4] The Treasury Regulations were changed to conform to this rather elusory standard,[5] but due to a technical rule of statutory construction [6] the instant court refused to accept this change. However, even in the face of the old regulation which they still consider effective, the court did decide there was a taxable profit in the instant case. For the guidance of the Board in determining this profit they laid down the test to be whether or not there was a difference between the "value" of the stock at the time of the sale and the sale price. Unfortunately the court did not define the term "value". If the court means market price then the test could only apply in those situations where, as in the instant case, the corporation by way of a contract or otherwise was able to secure a premium over and above the existing market price. On the other hand if the court by "value" means the book value of the shares, then there is nothing to prevent the corporation from keeping their books so that the book value would always be above the sale price and thus under the test there would never be a profit but rather a deductible loss. Possibly actual value was meant.[7] However no matter what definition of value is accepted, the basis of this test of whether the corporation has realized a profit is dependent not on whether the corporation as an entity has had a mere physical increase in its total assets, but whether the individual shareholder's status has been enriched due to an

1. E. R. Squibb & Sons, 36 B. T. A. 260 (1937).

2. U. S. Treas. Reg. 65, Art. 543, interpreting the gross income section of the Revenue Act, 40 STAT. 1057 (1918), 26 U. S. C. A. § 22 (a) (1934).

3. The leading case adopting this view is Simmons & Hammonds Mfg. Co., 1 B. T. A. 803 (1925). For an excellent review of the decisions, see Houstin Bros. Co., 21 B. T. A. 804 (1930), which overrules New Jersey Porcelain Co., 15 B. T. A. 1059 (1929) and Behlow Estate Co., 12 B. T. A. 1365 (1928). Both these latter cases were contra to the *Simmons* case, *supra.*

4. Commissioner v. S. A. Woods Machine Co., 57 F. (2d) 635 (C. C. A. 1st, 1932), *reversing,* 21 B. T. A. 818 (1930), *certiorari denied,* 287 U. S. 613 (1932); Spear & Co. v. Heiner, 54 F. (2d) 134 (W. D. Pa. 1931). These two latter cases were followed in Allyne Zerk Co. v. Commissioner, 83 F. (2d) 525 (C. C. A. 6th, 1936), which seems to recognize the new Treasury Regulation; *cf.* Walville Lumber Co. v. Commissioner, 35 F. (2d) 445 (C. C. A. 9th, 1929). See also Note (1937) 47 YALE L. J. 111.

5. U. S. Treas. Reg. 65, Art. 543, as amended by T. D. 4430 (1934).

6. Instant case at page 70. The rule is: If a statute is reasonably susceptible of two constructions, its re-enactment after an interpretive ruling by a responsible official amounts to a legislative sanction of the course pursued. See J. R. Reynolds Co. v. Commissioner, 97 F. (2d) 302 (C. C. A. 4th, 1938) and authorities cited therein.

7. This can be worked out, as a practical matter, by presuming the book value to represent actual value, but allowing either party to rebut this presumption by showing that the stated value of the corporation's assets was below or above their real worth.

increase in the intrinsic worth of his shares.[8] In no other phase of corporate taxation has this proposition been advanced, but perhaps this should properly be made the basis for all corporate taxation.[9] The test adopted by the Board shows the fundamental weakness of treating the corporation as an entity. Normally the buyer of treasury shares is merely putting in enough money to equalize his position with that of the existing shareholders. Although the price so paid may be higher than the price paid by the corporation for the shares due to an increase of surplus in the interim, it is hard to understand how the corporation, as a group of shareholders has profited by the transaction when no individual shareholder has profited thereby. There seems to be no perfect answer to this perplexing problem,[10] and as yet the Supreme Court has not passed an opinion on this issue; but the decision of the instant court seems to be a step in the right direction.

Trade Regulation—Validity of Statutes Regulating Prices and Hours in Barber Shops—An Oklahoma [1] statute provides for the regulation of barber shops by a board. The constitutionality of the provision empowering the board to fix minimum prices [2] was attacked. *Held,* that the statute is a valid exercise of the state police power in that the regulation is reasonably related to the promotion of health, welfare, and comfort of the community. *Herrin v. Arnold,* 82 P. (2d) 977 (Okla. 1938).

A proposed Massachusetts statute fixed the time of opening and closing of barber shops. *Held,* that the statute was an invalid exercise of the police power because there was no reasonable relation to public health and morals. *Opinion of the Justices,* 5 U. S. L. WEEK 1243 (Mass. 1938).

Both courts agree that barber shops may be properly regulated under the police power if the regulation bears a reasonable relation to public health and morals. While there is much support for the view expressed in the Massachusetts case,[3] the Oklahoma case is the first case to find a reasonable relation to health sufficient to uphold price-fixing in barber shops.[4] However, in both cases it is questionable whether public health was the underlying factor. For example, the Oklahoma act indicates that its real purpose is to regulate competition, provide machinery for the settlement of labor disputes, and generally help the trade through present

8. *Cf.* J. R. Reynolds Co. v. Commissioner, 97 F. (2d) 302 (C. C. A. 4th, 1938). But see Borg v. International Silver Co., 11 F. (2d) 147 (C. C. A. 2d, 1925). See also Note (1937) 47 YALE L. J. 111.

9. *Cf.* First Chrold Corp. v. Commissioner, 97 F. (2d) 22 (C. C. A. 3d, 1938), which suggests as a test to determine whether a gain is an income gain or a capital gain, whether or not it is distributable out of profits.

10. See 3 PAUL AND MERTENS, LAW OF FED. INCOME TAXATION (1934) § 26.99.

1. Okla. Laws 1937, c. 24, art. 2.

2. *Id.* at § 12.

3. *In re* Scaranino, 7 Cal. (2d) 309, 60 P. (2d) 288 (1936); Denver v. Schmid, 98 Colo. 32, 52 P. (2d) 388 (1935); State *ex rel.* Pavlik v. Johannes, 194 Minn. 10, 259 N. W. 537 (1935); and other cases cited in the Massachusetts case at 1243. There are only three minority decisions: Feldman v. Cincinnati, 20 F. Supp. 531 (S. D. Ohio 1937); Falco v. Atlantic City, 99 N. J. L. 19, 122 Atl. 610 (1923); Wilson v. Zanesville, 130 Ohio St. 286, 199 N. E. 187 (1935.) A Phila. Ordinance similar to the Mass. statute was declared unconstitutional. Phila. Legal Intelligencer, Oct. 27, 1938, p. 1, col. 1.

4. *Contra:* Mobile v. Rouse, 27 Ala. App. 344, 173 So. 254, *aff'd,* 233 Ala. 622, 173 So. 266 (1937), where the court used public interest language to distinguish it from the *Nebbia* case; State *ex rel.* Ives, 123 Fla. 401, 167 So. 394 (1936), where the court said that barber shops could not be regulated because they were not a paramount industry; Duncan v. Des Moines, 222 Iowa 218, 268 N. W. 547 (1936).

economic conditions.[5] Yet, courts, in deciding the constitutionality of such police power legislation, have been prone to rationalize in terms of businesses affected with a public interest [6] or promotion of public health, morals, or welfare.[7] Initially, such categories were applied with some factual justification; [8] today they have been applied indiscriminately to new situations without explanation and have become merely a screen for the underlying factors.[9] More recently, the U. S. Supreme Court has adopted a more general rationale determining whether the legislation is reasonable and not expressly prohibited by the Constitution.[10] The exact limitations of these holdings are not quite clear but they may be taken as an indication that the present Supreme Court will not allow the "due process" and "equal protection" clauses of the Fourteenth Amendment to block legislation for which there is a reasonable economic justification. Such a view is not only a more sensible interpretation but also will convey more honestly than the older language the real reasons considered by the courts in reaching their conclusions.

Trade Regulation—Invalidity of Pennsylvania Statute Regulating Retail Sale of Gasoline—Plaintiff sought to enjoin the enforcement of a statute requiring retail gasoline operators to post prices, and forbidding the giving of rebates, discounts, or anything of value to purchasers of gasoline in return for sales.[1] *Held,* that those provisions which prevent the giving of rebates, discounts, or anything of value to purchasers are unconstitutional and void, because, inter alia, they deprive the plaintiffs of their property without due process of law contrary to the Fourteenth Amendment of the United States Constitution. *The Sperry & Hutchinson Company and Alfred Bayley v. Boardman, Secretary of Revenue and Margiotti, Attorney General,* Phila. Legal Intelligencer, Sept. 8, 1938, p. 1, col. 5 (Pa. C. P. 1938).

In so far as the statute in the instant case resulted in the fixing of gasoline prices,[2] the court in declaring it unconstitutional was deciding squarely within case authority as it stands in the federal courts. Directly in point is *Williams v. Standard Oil Co. of Louisiana* [3] wherein the Supreme Court invalidated a Tennessee statute [4] which gave the commis-

5. Although public health language is used in the act, the economic argument is given greater stress. It may be that the health language was inserted merely to aid in having the act declared constitutional. See Okla. Laws 1937, c. 24, art. 2, § 1.

6. Munn v. Illinois, 94 U. S. 113 (1876) (warehouses); German Alliance Insurance Co. v. Lewis, 233 U. S. 389 (1914) (insurance).

7. Holden v. Hardy, 169 U. S. 366 (1898).

8. Munn v. Illinois, 94 U. S. 113 (1876); Jacobson v. Massachusetts, 197 U. S. 11 (1905).

9. See the opinion of Justice Roberts in Nebbia v. New York, 291 U. S. 502, 532, 536 (1934) and the discussion of the *Adkins* case in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 398 (1937).

10. See Nebbia v. New York, 291 U. S. 502, 537 (1934); West Coast Hotel Co. v. Parrish, 300 U. S. 379, 399 (1937). See also CORWIN, THE TWILIGHT OF THE SUPREME COURT (1934) 52 *et seq.*; Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York* (1934) 34 COL. L. REV. 401; Note (1934) 82 U. OF PA. L. REV. 619; (1938) 86 U. OF PA. L. REV. 780.

1. PA. STAT. ANN. (Purdon, Supp. 1937) tit. 58, § 161 *et seq.*

2. The court in the instant case reasoned that the prohibition of rebates and discounts, in that it prevented the dealer from preferring cash or short term credit customers, had the effect of fixing his prices at the level of those placed on long term purchasers.

3. 278 U. S. 235 (1929), 38 YALE L. J. 774, 17 CALIF. L. REV. 309; see Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183, 192 (1936).

4. Pub. Acts Tenn. 1927, c. 22.

sioner of finance and taxation the power to fix gasoline prices and prohibited rebates, on the grounds that gasoline was not "affected with public interest".[5] The phrase, "affected with public interest", used as a standard in deciding which industries could be subjected to price regulation and interpreted by the Supreme Court to mean *"devoted* to public use and . . . in effect, granted to the public",[6] was never immune from criticism. That this criticism should have been expressed chiefly in dissents by Justices Brandeis, Stone, and Holmes,[7] who are today delivering, or by their writings inspiring, majority rather than minority opinions,[8] would probably not have been sufficient reason for the court in the instant case to have decided contrary to the direct authority of the *Williams* case. However, there is good reason to believe that the principles upon which the *Williams* case was decided have been abandoned by the Supreme Court in the majority opinion of *Nebbia v. New York.*[9] While the holding of the latter case is not factually in point, the ratio decidendi of the opinion seems clearly to indicate an altered view of the meaning of "affected with public interest". In the light of this evident revision of premises on the part of the Supreme Court, the following by the instant court of the *Williams* case, which was based on the older view of the public-interest standard, seems a questionable application of the rule of stare decisis.[10]

Trade Regulation—Validity of State Regulation of Photographers to Protect Against Fraud and Imposition—Defendant was indicted for practicing commercial photography without a license, in violation of a statute [1] authorizing a Board of Examiners to license, after examination, anyone who qualified as to competency, ability, and integrity.[2] *Held* (two justices dissenting), that it is in the public interest, and within the police power [3] to regulate the practice of photography, since it is an

5. There are two federal district court decisions—United States v. Mills, 7 F. Supp. 547 (D. Md. 1934) and United States v. Superior Products, Inc., 9 F. Supp. 943 (D. Idaho 1935)—testing the constitutionality of the Petroleum Code of the National Industrial Recovery Act, 48 STAT. 195 (1933), 15 U. S. C. A. § 701 *et seq.* (1937). Art. 5, rule 3, ¶¶ 4, 5, 6 and 7, of the Code, identical with the Pennsylvania statute of the instant case, were put in dispute. Neither case discusses the gasoline industry as affected with public interest; yet both declare the Code provisions unconstitutional as violative of the due process clauses of the Fourteenth and Fifth Amendments, seemingly because they attempt to regulate intrastate commerce.

6. Justice Sutherland in Tyson & Bro., Inc. v. Banton, 273 U. S. 418, 434 (1927), 75 U. OF PA. L. REV. 778, 40 HARV. L. REV. 40, 25 MICH. L. REV. 880. The fullest explanation of what "affected with public interest" once meant to the Supreme Court will be found in Chief Justice Taft's opinion in Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 (1923).

7. New State Ice Co. v. Leibmann, 285 U. S. 262, 280 (1932) (Brandeis, *J.*); Tyson & Bro., Inc. v. Banton, 273 U. S. 418, 447 (1927) (Stone, *J.*); *id.* at 445 (Holmes, *J.*).

8. See Fraenkel, *Constitutional Issues in the Supreme Court, 1936 Term* (1937) 86 U. OF PA. L. REV. 38.

9. 291 U. S. 502 (1934). "So far as the requirement of due process is concerned . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and enforce that policy by legislation adapted to its purpose." *Id.* at 537. "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for public good." *Id.* at 536. See Recent Case comment in this issue of the REVIEW at .

10. *Cf.* (1938) 86 U. OF PA. L. REV. 546; 86 U. OF PA. L. REV. 906.

1. N. C. CODE (Michie, 1935) §§ 7007 (1)-7007 (29).

2. *Id.* § 7007 (10). Licenses were to be granted without examination to photographers engaged in the practice for one year before passage of the Act, *id.* § 7007 (18).

3. On the police power generally see 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) c. 16; and cases collected in 6 R. C. L. 203 *et seq.*

occupation requiring skill, involving a fire hazard, and capable of lending itself to the perpetration of fraud. *State v. Lawrence,* 197 S. E. 586 (N. C. 1938).

This case is of interest in that it validates a statute which goes beyond mere regulation of the business itself,[4] regulating instead its personnel as to responsibility, character and knowledge.[5] Similar legislation has been upheld with respect to professions generally,[6] and to businesses thought to be peculiarly susceptible to improper influences because a fiduciary relationship is involved,[7] or because the business has been the medium of considerable fraud.[8] Broader application has encountered considerable opposition on the theory that to prevent a person from engaging in a lawful and innocuous business because of his moral character or reputation is an arbitrary invasion of private rights.[9] And where, as in the instant case, the legislation is supposedly for protection against fraud, those who regard with apprehension the encroachment of this type of legislation on private rights, contend that if occasional opportunity for fraud is to be the test, legislative regulation of personnel would be unrestricted, for there is, perhaps, no business or profession which does not offer peculiar opportunities for reprehensible practices.[10] Furthermore, there is always the danger that this pretext might be used to disguise what is essentially class legislation prompted by a particular group of tradesmen to restrict admission into their field. Certainly the state may protect its citizens from the dishonesty, incompetence, and irresponsibility of those with whom they deal;[11] but how far the state may go in this policy of protecting the unwary from imposition remains an open question,[12] to which the extreme position of this case is a possible though unpromising solution.

4. Regulation of a particular business or industry is often justifiable for economic reasons—". . . as a method of correcting evils, which . . . could not be expected to right themselves through the ordinary play of the forces of supply and demand. . . ." Nebbia v. New York, 291 U. S. 502, 518 (1934). See Recent Case comments in this issue of the REVIEW at .

5. See McCarty, *Protecting the Public: Encroachment of Social Legislation on Private Rights* (1925) 11 A. B. A. J. 36, 112, 115; MacChesney, *Legal Regulation of the Personnel of Business* (1924) 58 AM. L. REV. 1.

6. Dent v. West Virginia, 129 U. S. 114 (1889) (physicians); State v. DeVerges, 153 La. 349, 95 So. 805, 27 A. L. R. 1530 (1923) (accountants); Douglas v. Noble, 261 U. S. 165 (1923) (dentists).

7. Payne v. Kansas *ex rel.* Brewster, 248 U. S. 112 (1918) (commission merchants); People *ex rel.* Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964 (1891) (auctioneers).

8. LaTourette v. McMaster, 248 U. S. 465 (1919) (insurance agents); Bratton v. Chandler, 260 U. S. 110 (1922) (real estate brokers). *Contra:* Rawles v. Jenkins, 212 Ky. 287, 279 S. W. 350 (1925).

9. "Broad as is the police power, its limit is exceeded when the state undertakes to require moral qualifications of one who wishes to engage or continue in a business which, as usually conducted, is no more dangerous to the public than any other ordinary occupation of life." Rawles v. Jenkins, 212 Ky. 287, 292, 279 S. W. 350, 352 (1925). But see Riley v. Chambers, 181 Cal. 589, 593, 185 Pac. 855, 856 (1919). It is generally recognized that a state cannot, under the guise of protecting the public, impose unreasonable and arbitrary restrictions upon lawful occupations. Bessette v. People, 193 Ill. 334, 62 N. E. 215 (1901) (horseshoers); Dasch v. Jackson, 170 Md. 251, 183 Atl. 534 (1936) 84 U. OF PA. L. REV. 1024 (paperhangers); State *ex rel.* Sampson v. Sheridan, 25 Wyo. 347, 170 Pac. 1 (1918) (cement contractors).

10. "There are those lacking in moral character connected with all trades and callings. Good morals cannot be created by legislation." Instant case at 593. See Adams v. Tanner, 244 U. S. 590, 594 (1917).

11. See Cheadle, *Government Control of Business* (1920) 20 COL. L. REV. 550.

12. See Hornaday v. State, 21 Okla. Cr. 354, 362, 208 Pac. 228, 231 (1922).